FUNDAMENTAL RIGHTS IN THE NEW CANADIAN CONSTITUTION
A CHARTER OF NEW HOPES AND NEW DIRECTIONS

Introduction

On April 17, 1982, after long delay and struggle, Canada finally proclaimed the Charter of Rights and Freedoms and guaranteed to its citizens basic fundamental rights by enshrining them into its new Constitution. Thereby, Canada joined the league of progressively democratic nations who have guaranteed the basic human rights of man in their Constitution. In view of the diversity of culture and language, as well as the protectionist attitude over provincial rights in Canada, the enshrining of fundamental rights in the Constitution was a monumental task. The desire of the Canadian leaders to follow the Canadian tradition and constitutional conventions of obtaining the unanimity of the provinces as well as to meet the requirements of the *British North America Act*, 1886[1], had further delayed the passage of the *Charter of rights and Freedoms* by the Canadian Parliament.[2]

Though close neighbours and major economic partners Canada's approach and style of government differs substantially from that of the United

[1] *British North America Act*, 1886, 49-50 viet., C. 35 (U.K.). Prior to the *Constitution Act*, 1982, British North America Act, was the Constitution of Canada.

[2] *The Constitution Act*, 1982, including the *Canadian Charter of Rights and freedoms*, had its origin in a document entitled "Proposed Resolution for a joint address to Her Majesty, The Queen, respecting the Constitution of Canada", published by the Government of Canada on October 2, 1980, (Proposed Resolution). By order adopted by the House of Commons on September 23, 1980, and by the Senate on November 3, 1980, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada was established to consider and report upon the Proposed Resolution. The Special Joint Committee made sixty-seven amendments to the Proposed Resolution, fifty-eight of which were advanced by the Government itself: (See the Committee's Proceedings, No. 57 (February 13, 1981) on P. 6) A number of further amendments were made when the proposed Resolution was reported back to the House of Commons and the Senate. After the Adoption of these amendments, on April 23, 1981, by the House and on April 24, 1981, by the Senate, further consideration of the Proposed Resolution was deferred pending the decision of the Supreme Court of Canada in Reference re *Amendment of the Constitution of Canada* (1981) 125 D.L.R. (3d)1, on appeal from the decisions on earlier references by the provinces of Manitoba (117 D.L.R. (3rd.) 1), Newfoundland (118 D.L.R. (3d) 1) and Quebec (120 D.L.R. (3d) 385).

Following the Supreme Court decision, the Government of Canada and the Governments of every province but Quebec reached an agreement on November 5, 1981, respecting the repatriation and amendment of the Constitution. The Proposed Resolution was then withdrawn and a new Resolution, revised in accordance with the Federal-Provincial agreement, was moved in the House of Commons on November 20, 1981. After several further amendments the Resolutions was adopted by the House of Commons on December 2, 1981. The Resolution as amended was moved in the Senate on December 3, 1981, and adopted on December 8, 1981.

Pursuant to the joint address of Senate and House of Commons, the United Kingdom Parliament enacted the *Canada Act 1982*, of which the *Constitution Act, 1982* in schedule B, the Royal Assent was given on March 29, 1982. In accordance with article 58 of the *Constitution Act*, 1982, the Act was proclaimed in force by the Queen on April 17, 1982.

States. It is feared in some circles that by enshrining fundamental rights in the Constitution similar to that of the United States the door has been opened for the judiciary to import the American jurisprudence into Canada.[3]

Recognition and Development of Human Rights in the Western World

Interest in human rights is as old as civilization itself. Once his primary requirements of security, shelter, and nourishment have been satisfied, man has distinguished himself from other animals by directing his attention to those matters which affect his individual dignity.

In ancient times, and for centuries thereafter, these rights were known as "natural rights": rights to which all men are entitled because they were endowed with a moral and rational nature. The denial of such rights was regarded as an affront to "natural law" — those elementary principles of justice which apply to all human beings by virtue of their common possession of the capacity to reason. These natural rights were the origins of the Western world's more modern concepts of individual freedom and equality.

In Britain, a long series of struggles beginning with the Magna Carta in 1215, led to the winning of political freedom. During the seventeenth and eighteenth centuries, the British government gradually recognized the existence of individual rights.

The men and women who came from Britain to settle along the Atlantic coast of America were familiar with those rights. It was the desire for greater freedom that had brought them to the new land. The freedom of thought encouraged by life in North America caused the leaders of those Thirteen Colonies to declare that "all men are created equal, that they are endowed by their creator with certain inalienable rights, that among those are life, liberty, and the pursuit of happiness". America's support for the "inalienable rights" of men were expressed in 1791 in a Bill of Rights. The Bill of Rights in the United States, enacted as an amendment to the United States Constitution, serves to safeguard the individual from governmental intolerance of these "inalienable rights".

[3]Prior to the passage of the Charter of Rights and Freedoms, the Canadian Courts were reluctant to follow American judicial experience in interpreting the provisions of the Canadian Bill of Rights. See *Curr* v. *The Queen*, (1972) 26 D.L.R. 3d 603; *A.G. Can* v. *Lavell; Isaac* v. *Bedard;* (1973) 38 D.L.R. (3d) 481. Abel Albert S.; *Laskin's Canadian Constitutional Law* states at page 900.31:

> Because of the similarity of s. 1(a) and (b) to the language of the Fifth and Fourteenth Amendments to the United States Constitution there has been, in argument at least, frequent resort to American authority. In general the Supreme Court of Canada has been wary of using American judicial experience to interpret the provisions of the Canadian Bill of Rights, in part because the unique role of the Fourteenth Amendment and its relationship to the first eight amendments to the American Constitution itself stands on a different footing than a piece of federal legislation (albeit one of paramount force) in a parliamentary system of government. Rejection of the American approach can be seen in *Curr* and *Lavell, supra,* and *Smythe* v. R. (1971) S.C.R. 680, 16 C.R.N.S. 147, 3 C.C.C. (2d) 366, 19 D.L.R. (3d) 480, 71 D.T.C. 5252. In *Curr* the Court did leave the door open (if there were manageable standards) for future use of the American concept of the due process clause as a means of controlling substantive federal legislation, but it is not open very wide.

In France, the 1789 Declaration of Rights of Man and Citizen sought to achieve similar results. It declared that "Men are born and remain free and equal in respect of the rights. The purpose of all civil associations is the preservation of the natural and imprescriptible rights of man". These rights are liberty, prosperity, and resistance to oppression.

Both in the United States and France, there was embodied the idea that men shall not be deprived of liberty or property except in accordance with the law. This is a manifestation of the belief that men should be ruled by laws, not men: that a government has no more power than the people have agreed to delegate to it.

These new governments were based on the following principles:

1. That men should be ruled by law,
2. That government draws its power from the consent of the people,
3. That both government and citizens are subject to the rule of law.

Today, democratic governments recognize that the rights of men include economic, social, and educational rights, as well as, political rights. Perhaps the fullest summing up of all these rights is found in the United Nations "Universal Declaration of Human Rights".

In Canada considerable discussion had taken place since 1945 concerning similar constitutional measures. The topic had been considered by the Canadian Bar Association, by parliamentary committees, and by numerous commentators.

While no constitutional step was taken till 1981 the Canadian Parliament in 1960 under the leadership of Prime Minister Diefenbaker had enacted "the Canadian Bill of Rights"[4] — a statute of considerable significance and one which prepared the way for the present Constitutional Amendment.

The Canadian Bill of Rights basically provided:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
> (b) the right of the individual to equality before the law and the protection of the law;
> (c) freedom of religion;
> (d) freedom of speech;
> (e) freedom of assembly and association; and
> (f) freedom of the press.

The provisions of the Bill of Rights, however, lacked constitutional protection and guarantee. Hence, any provincial legislature or parliament, as the case may be, could repeal the freedoms guaranteed in the Bill of Rights

[4] *The Canadian Bill of Rights*, 8-9 Elizabeth II, C44 (Canada), R.S.C. 1970, Appendix III.

as with any other statute it had enacted. In this sense, Canadians did not have the benefit of a constitutional protection of fundamental freedoms as existed in many other democratic countries.

After a long and bitter controversy,[5] and over the initial objections of the Provinces,[6] the Canadian Parliament, in 1982, finally enshrined the basic rights and freedoms of its people in the Constitution under the heading "Canadian Charter of Rights and Freedoms".

The Canadian Charter of Rights and Freedoms

The Canadian Constitution Act of 1982, sets out a Canadian Charter of Rights and Freedoms that establishes for all Canadians protection of certain basic rights and freedoms essential to maintaining a free and democratic society and a united country. The Charter of Rights applies to all governments — Federal, Provincial, and Territorial[7] and contains the following:

1. Fundamental Freedoms[8]
2. Democratic Rights[9]
3. Mobility Rights[10]

[5]No one in the debate was opposed to the ideal of rights themselves. Canadians share the British tradition of rights, and have borrowed freely from the French and Americans as well. The major differences were over which rights should be recognized, and how they can be protected. The federal government presented a detailed list of rights at the September, 1980, First Ministers' Conference and included a slightly revised list, to be binding on both levels of government in its Constitution Resolution.

The Premiers countered that the Prime Minister, Mr. Trudeau, did not appreciate the regional nature of country, and that the provincial control of certain policy matters was just as important to them and their citizens as rights were to him. Seven of the ten provinces rejected the Charter of Rights on principle, contending that it would take power *away* from the people by forcing them to go tho the courts rather than their legislatures to process their grievances. They further held that most provinces do already have effective human rights legislation, that a rigid charter could limit the government's ability to take action against problems like pornography and Sunday shopping, that courts are inevitably less senstivie to social needs than the legislature and that the whole idea was repugnant to Parliamentary sovereignty. So between Ottawa and the provinces, there was a basic clash of strongly-held principles.

However, Premier William Davis of Ontario, speaking for the minority of the provinces, said that entrenchment of Rights and Freedoms in the Constitution did not remove absolute authority from either the provinces or the Government of Canada. It just made the exercise — a constitutional amendment instead of ordinary legislation — more difficult. He added, "We readily do support the entrenchment because we believe governments and people must make explicit their commitments to protect the liberties of individuals." See *Globe & Mail* (Toronto, Canada) September 11, 1980.

The opposition to the Charter of Rights by the provinces was so great that they challenged the constitutionality of the Parliament to enact or amend the B.N.A. Acts without the consent of the provinces. See footnote 2.

[6]The Province of Quebec had refused to join the First Ministers in their final accord over the enactment of the Charter of Rights and Freedoms.

[7]The Constitution Act, 1982, Section 32.

[8]*Ibid.*, Section 2.

[9]*Ibid.*, Sections 3 to 5

[10]*Ibid.*, Section 6.

4. Legal Rights[11]
5. Equality Rights for all Individuals[12]
6. Official Languages of Canada[13]
7. Minority Language Education Rights[14]
8. Canada's Multicultural Heritage[15]
9. Native People's Rights[16]

Canadians have enjoyed many of these basic rights and freedoms as a matter of practice for many years. Certain rights are set out in the *Canadian Bill of Rights*, 1960, and the *Canadian Human Rights Act*, 1977[17] as well as in various provincial laws.[18] However, these rights and freedoms were not guaranteed under the Constitution and hence, could be denied on the whim of the legislature. Thus, the Canadian Parliament, by enacting the Charter of Rights of the Constitution has assured Canadians that their basic freedoms and rights are no longer at the mercy of the politicians.

Reasonable Limit Prescribed by Law

Parliament, while incorporating the Canadian Charter of Rights and Freedoms in the Constitution, made it clear that the rights and freedoms guaranteed in the Charter are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It would be for the courts to determine whether or not the restrictions imposed by law on one's rights and freedoms meet the criteria laid down in Section 1 of the new Constitution. Section 1 of the Constitution Act, 1982, provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

What is meant by "demonstrably justified in a free and democratic society"? Recently, Chief Justice Deschenes of the Quebec Supreme Court in

[11] *Ibid.*, Sections 7 to 14

[12] *Ibid.*, Section 15

[13] *Ibid.*, Sections 16 to 22

[14] *Ibid.*, Section 23

[15] *Ibid.*, Section 27

[16] *Ibid.*, Section 25

[17] The Canadian Human Rights Act, R.S.C. 1977, Ch. 33

[18] See for example:

The Ontario Human Rights Code, R.S.O. 1981, CL. 53
The Manitoba Human Rights Act, R.S.M. 1974, Chapter 175
The Nova Scotia Human Rights Act, R.S.N.S. 1969, Chapter 11
The Individual's Rights and Protection Act (of Alberta) R.S. Alb. 1980, Ch. 1-2.
The Human Rights Act (of Prince Edward Island), R.S. P.E.I. 1975, Ch. 72
The Newfoundland Human Rights Code, R.S.N. 1970 Ch. 262

Quebec Association of Protestant School Boards v. *Attorney General of Quebec, No. 1*,[19] confirmed that the Provincial legislature is now limited by the rights confirmed by the Charter, and the question of conflict between the Charter and the Provincial law is not a matter solely of provincial interest. The Attorney General of Canada, moreover, has an interest in the proper administration of the Charter throughout Canada. The learned Chief Justice held:

> Section 1 (of the Constitution) authorizes limitations on rights that are demonstrably justified in a free and democratic society, and *what is demonstrably justified in one part of Canada must be equally so in the rest of the country.* (Emphasis added)

Chief Justice Deschenes in the case of Number 2[20] (between the same parties) held that according to Section 1 of the Constitution the burden lies on the Government to prove that the infringement is a reasonable limit that is prescribed by law and demonstrably justifiable in a free and democratic society. He stated:

> The Charter is part of the Constitution of Canada, not merely an ordinary statute, and ought to be generously rather than legalistically interpreted to give individuals the full measures of the rights and freedoms that it guarantees. While the Charter permits limitation of rights provided they meet the conditions set out in Section 1, the *outright abrogation or denial of rights is forbidden. Section 24(1) is unqualifed in providing for judicial sanctions whenever an abrogation or denial has taken place.*
>
> The limitation set out in this section (1) is stated to apply to all of the rights and freedoms conferred by the Charter, and thus applies to the minority language educational rights conferred by Section 23.

He added:

> A limit is reasonable within the meaning of this section if *it is a means proportionate to the end at which the law is directed.* Evidence of mere error is not necessarily an evidence of unreasonableness; the error must be such that it offends common sense. The Court, moreover, must not lightly substitute their opinion for that of the legislature.[21] (Emphasis added)

In *Regina v. Altseimer*[22], the Ontario Court of Appeal upheld the constitutionality of the compulsory breath test provisions under the *Criminal Code*. In doing so the Court observed that "the Charter was not intended as a transformation of our legal system or the paralysis of law enforce-

[19](1982) 16 A.C.W.S. (2d) 152, (Que. S.C. Deschenes C.J.)

[20]*Quebec Association of Protestant School boards* v. *Attorney General of Quebec (No. 2)*, 1982 (Que. S.C. Deschenes C.J.).

[21]*Ibid.*

[22](1982) 8. W.C.B. 288 (Ont. C.A.)

ment, and that extravagant interpretations could only trivialize and diminish respect for the Charter which is a part of the supreme law of the country".

Thus, in deciding whether or not the limitation imposed by law is reasonable or not, the courts must determine what is a reasonable limit demonstrably justifiable in a free democratic society by reference to Canadian society and by the application of principles of political science[23]. According to Justice Evans of the Ontario High Court "the criteria by which these values are to be assumed are to be found within the Charter itself, which means that the court is entitled to look at those societies in which, as a matter of common law, freedoms and democratic rights similar to those referred to in the Charter are enjoyed".[24]

Rights and Freedoms Also Apply to Corporations

The rights and freedoms guaranteed under the Charter are not limited to only natural born persons but equally extend to corporate persons. The Alberta Queen's Bench, in a recent case, of *Southam Inc.* v. *Hunter,*[25] held that the expression "everyone" used in Section 8 of the Constitution should be interpreted to include *all entities* that are capable of enjoying the benefits of security against unreasonable search. The Court emphasized that in interpreting Constitutions, a broad and liberal interpretation should be given. The Court observed that while the beneficiaries of the rights guaranteed in Sections 2, 7, 9, 10, 12, and 17 of the Charter are described as "everyone", and in those sections the rights guaranteed are rights that only human beings can enjoy, whereas the expression "everyone" as used in Section 8 of the Charter should include corporations.

It may, however, be noted that the Ontario Court of Appeals in *Regina* v. *Colgate Palmolive Ltd.*[26] had held that the expression "individual" in the *Bill of Rights* did not include a corporation. The rationale behind the liberal interpretation by the Alberta Queen's Bench seems to be based on the fact that it was interpreting the Constitution rather than a statute, and secondly, when the Constitution used "everyone" instead of "individual" it must have intended to include non-natural persons also.

Fundamental Freedoms

The Canadian Constitution has recognized the four basic freedoms and has guaranteed those to all the residents of Canada. Those are:

(a) Freedom of conscience and religion;
(b) Freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication;

[23] See *Federal Republic of Germany* v. *Rauca*, (Nov. 4, 1982 Ont. H.C.J. Evans C.J. H.C.)

[24] *Ibid.*

[25] (1982) 136 D.L.R. (3d) 133 (Alt. Q.B.)

[26] (1972) 8 C.C.C. (2d. 40 (Ont. C.A.)

(c) Freedom of peaceful assembly; and
(d) Freedom of association.

These classic freedoms are embodied in Section 2 of the Constitution.

(a) *Freedom of Conscience and Religion*

It has been the experience of all countries that those who are in power are likely to enforce their ideas of religion on those who are not in power. Hence it is universally accepted that freedom of conscience should be recognized, declared and guaranteed in the Constitution. Thus, the Canadian Charter of Rights has given the first priority to the freedom of conscience and religion. It is intended to allow everyone to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the exclusive support of any religious tenets or modes of worship of any section of the community. It is well recognized that no interference with man's relations to his Maker should be permitted provided always that the laws designed to secure the peace, order, and morals of the society are not interfered with.

Now, every person has a fundamental freedom under the Canadian Constitution not merely to entertain such religious beliefs as may be approved by his/her judgment or conscience but to exhibit his/her belief and ideas is such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. The freedom of conscience and religion envisioned in the Charter of Rights has two aspects. Positively it safeguards the free exercise of religion by all persons, subject to public order, morality and health. Negatively it prohibits compulsion by law of the acceptance of any particular creed or practice of religion. However, the Constitution has made it abundantly clear that the rights and freedoms guaranteed in the Canadian Charter of Rights are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The earlier decisions suggest that the courts generally struck down the provincial statutes and city bylaws which interfered with the exercise of religious freedoms. In *Saumar* v. *Quebec and Attorney General of Quebec*[27], the Supreme Court of Canada held that a "bylaw of the City of Quebec passed on October 27, 1933, does not extend so as to prohibit the appellant as a member of Jehovah's Witnesses from distributing in the streets of Quebec any book, pamhlet, booklet, circular, or tract of Jehovah's Witnesses included in the exhibit". The City of Quebec was restrained from in any way interfering with such actions of the appellant. Kellock, J. observed:

[27](1953) 2 S.C.R. 299, (1953) 4 D.L.R. 641 (S.C.C.)

> It would, in my opinion, be absurd to say that a provincial legislature, while it cannot strike at the right of any such class to impart religious instruction to its adherents, *may nevertheless* legislate so as to affect or destroy the religious faith of the denomination and thus affect or entirely do away with all necessity for religious instruction in that faith. . .[28]

In *Chaput* v. *Romain*,[29] which involved an action for damages arising out of the dispersal by the police of a religious gathering of Jehovah's Witnesses on private premises, Justice Taschereau of the Supreme Court of Canada made some very significant observations:

> In our country, there is no state religion. All religions are on equal footing, and Catholics, as well as Protestants, Jews and other adherents to various religious denominations enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else. It would be distressing to think that the majority might impose its religious views upon a minority, and it would also be a shocking error to believe that one serves his country or his religion by denying in one Province, to a minority, the same rights which one rightly claims for oneself in another Province.

After the passage of the *Canadian Bill of Rights* in 1960, the validity of the *Lord's Day Act*[30] was challenged in *Robertson and Rosetanni* v. *The Queen*.[31] The Supreme Court of Canada (majority) found it possible to reconcile the Act with the provisions of the *Canadian Bill of Rights. It held that in effect freedom of religion was not abridged by state support of particular religious tenets (Christian in this case) so long as there was no compelled observance thereof by others; and the fact that those others were obliged to close their business on Sunday was a secular consequence. This view, however, is not shared by all. According to Laskin's Canadian Constitutional Law:*

> "The result of the *Robertson and Rosetanni Case* was not only to curtail the efficacy of the *Canadian Bill of Rights* but also to suggest a limitation on the constitutional authority of Parliament in relation to freedom of religion; unless, of course, it be the case that Parliament's exclusive authority is larger in the constitutional sense than the scope of freedom of religion in the Canadian Bill of Rights"[32]

The issue of religious freedom under the Charter has not yet come before the courts. It would indeed be interesting to observe whether or not the

[28] *Ibid.*

[29] (1955) S.C.R. 834, (1954) [D.L.R. (2d) 241 (S.C.C.)

[30] Lord's Day Act, R.S.C. 1970, C. L-13

[31] (1963) S.C.R. 651, (1963) 41 D.L.R. (2d) 485 (S.C.C.)

[32] Abel, Albert S.; *Laskin's Canadian Constitutional Law* 847 (4th rev. ed.), Toronto: The Carswell Company Ltd. (1975)

courts would be able to reconcile the *Lord's Day Act* and similar statutes with the freedom of religion provision in the new Constitution.

(b) *Freedom of Speech and Expression*

Section 2 of the Constitution has guaranteed to every person "freedom of thought, belief, opinion, and expression including freedom of the press and other media of communication". It may be noted that under the new Constitution "freedom of speech and freedom of press" are combined together in Subsection (b) of Section 2 of the Charter, whereas in the *Canadian Bill of Rights* 1960, freedom of speech and freedom of press were provided separately.

The most important aspect of freedom is freedom of mind. A democracy can endure and make happiness possible for its people only if its citizens are permitted freedom to question and to doubt. But as someone said wittily, freedom to think cannot help unless you use your head. To think is to compare things with one another, to notice wherein they agree and disagree.

Freedom of thought, in any valuable sense, includes freedom of speech. (It is not clear why Parliament did not use the commonly understood expression "freedom of speech" in Section 2(b) of the Constitution). However, the intent is obviously clear. Canada has staked its future on the belief that in the free market-place of thoughts, by the matching of ideas, truth has a better chance of winning than by any other method known to man.

The right to discuss things extends to all the people of Canada. If a man does not like the government, he can stand up and say so without fear or favour. He may state his opinion freely and openly on all public matters without fear of being punished or interfered with by the police, government officials or any other person.

A man may speak, wrongly or foolishly, yet a denial of his right to do so is a denial of his freedom, but free speech is not the same thing as free shouting. You may not, in the name of free speech, prevent others from being heard. Neither is it true that freedom to speak without prior permission means that a person may say what he likes. If he is libelous, or seditious, or blasphemous, or obscene, he can afterwards be made liable for it.

The newspaper and other media have been guaranteed the same freedom to express their opinions on public questions as any citizen has. Freedom of the Press means freedom from previous censorship, and not freedom from subsequent prosecution for crimes. The Press is free, but it is expected to be responsible.

The Federal Court of Canada in a recent case of *The Queen* v. *L. James Lorimer & Co. Ltd.*,[33] held that Section 11 of the *Copyright Act*[34]

[33] *The Queen* v. *James Lorimer & Co.*, (April 30, 1982) (Federal Court, Jerome A.C.J.)

[34] R.S.C. 1970, Ch. C-30

which gives the Crown copyright over reports prepared or published by or under the direction or control of Her Majesty or any government department, did not constitute an infringement of freedom of expression. The Crown may, therefore, properly claim damages and other relief based on Section 11 of the Act where a publisher publishes a condensed version of a government report without the consent of the government.

Freedom of the Press does not mean that the government is prohibited in limiting that right in the public interest. In *Regina* v. *Bonville*,[35] the New Brunswick Provincial Court held that Section 467 of the *Criminal Code*, which prohibits publication of the evidence taken at the preliminary inquiry until the accused is discharged or until the completion of the trial, while a restraint upon the freedom of the Press does not violate the freedom of the Press guaranteed in the Charter. The Court pointed out that the freedom of the Press must of necessity not be construed so as to encroach upon the other freedoms enshrined in the Charter. In any event, such a restraint on the Press is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society within the meaning of Section 1 of the Charter. The purpose of Section 467 of the *Criminal Code* is to protect the liberty of the individual and ensure that the person accused of a crime does not suffer any prejudice by pretrial publicity of the evidence adduced at his preliminary inquiry. See also *Re S.D.A.*, (1982), 2 R.F.L. (2nd) (12) (B.C. Prov. Ct.); *Re B. el: al.* and *The Queen* (1982) 8. W.C.B. 208 (Ont. H.C.)

The Ontario High Court, however, in *Southam Inc.* v. *The Queen*[36] found that Section 12(1) of the *Juvenile Delinquents Act*,[37] which requires that all trials of juveniles for delinquencies under the Act be held in camera, was unconstutional, as contrary to the right and freedom of expression and freedom of the Press. The court pointed out that while the courts have an inherent jurisdiction to forbid public access in certain instances, however, in the light of the Canadian Charter of Rights *it is not open to Parliament to preempt an entire field* by enacting legislation that provides in *camera* hearing for certain classes of cases regardless of circumstances.

(c) *Freedom of Peaceful Assembly*

Section 2c of the Charter guarantees the freedom of peaceful assembly to all people in Canada. In the *Canadian Bill of Rights, 1960,* "freedom of assembly" and "freedom of association" were provided for under two separate subsections. Further, it may be noted that the expression "peacefull" was added before "assembly" in the Charter of Rights. The rationale for doing so is not clear.

Freedom of assembly is an essential element of any democratic society. The right of peaceful assembly, however, is not an absolute right. Riotors,

[35](1982) 8 W.C.B. 222 (N.B. Prov. Ct., Harber J.)

[36](1982) 8 W.C.B. 206 (Ont. H.C. Smith J.)

[37]R.S.C. 1970, — Ch. J-3.

or disorderly assemblies, are not protected and reasonable restrictions may be imposed in the interest of public order, safety and security of the state. For example: In Ontario the legislation dealing with picketing is contained in Section 20 of the *Judicature Act*. That section deals with injunctions in labour disputes and it limits the court's authority to issue a "labour injunction". Where a labour dispute exists an injunction is not intended to be issued unless it is required to prevent or remove any alleged danger of damage to property, injury to persons, obstruction or interference with lawful entry upon or exit from the premises in question. Peaceful picketing in a primary labour dispute, however, is intended to be permitted.

(d) *Freedom of Association*

The Canadian Constitution guarantees the freedom of association to all residents. Canadians, thus, have the right to form and join all sorts of voluntary associations for purposes in which they are interested without interference by government. The associations may be social, cultural, religions, educational, business, or political. The right to form an association implies that several individuals get together and form voluntary association with common aims, a *legitimate purpose* and having a community of interest. The right to form an association obviously, includes the right to its continuance. The right to form associations, thus implies that the persons forming an association have the right to continue to be associated with only those whom they voluntarily admit in the assocation. This right can be effective only if it is held to include within the right to continue the association with its composition as voluntarily agreed upon by the persons forming the association.

The right to form and join an association also implies the negative right not to join an association. Would the negative right not to join an association be regarded as a fundamental right under the Charter?

Does the "freedom of association" as provided in the Charter extend to the freedom to form and join a trade union?

The Canadian Constitution has not expressly provided the right to join and form a trade union under the "fundamental freedoms" provision of the Charter of Rights. However, a trade union is nothing but an association of the employees, formed voluntarily by a group of employees with a common aim and understanding. The right to form and join a trade union has long been guaranteed to Canadian workers, in Federal and all Provincial jurisdictions under the respective labour relations legislation.[38] The Constitutional guarantee of freedom of association has further reinforced the worker's right to join and form a union of his/her choice.

Does the freedom of association, however, involve or carry with it a concommitant right that such associations or unions should be able to achieve the objectives which are supposed to underlie the formation of an association or union? For example; does the freedom of association (union) lead

[38]See for example Canada Labour Code R.S.C. 1970, Ch. L-1; Ontario Labour Relations Act, R.S.O. 1980, Ch. 228.

to the conclusion that the unions have a guaranteed right to effective collective bargaining and/or to strike?

The Public Service Alliance of Canada (the largest Federal employees union in Canada) has challenged the recent statute, The Public Sector Compensation Restraint Act,[39] on the grounds that it violates freedom of association, as well as equality before the law. The case is still pending before the Federal Court of Canada.

The right to strike may be restricted by appropriate labour relations legislation without violating the Charter of Rights, as long as it does not interfere with the other rights guaranteed under the constitution.

In a recent decision, the Ontario Labour Relations Board held that *Ontario's Inflation Restraint Act,* (covering 500,000 public service workers in the province) which suspended effective collective bargaining over any issue, did not violate the Canadian Charter of Rights and Freedoms. The Board rejected the Union's argument that the suspension of collective bargaining by the *Inflation Restraint Act* abrogated the freedom of association guaranteed under the new Constitution.[40]

The matter has arisen out of an application by a local of the Service Employees International Union to displace the Christian Labour Association of Canada as a bargaining agent for employees of two nursing homes. The Board held that the collective agreement between the Christian Labour Association and the two nursing homes had been extended by the Act beyond their normal expiry dates so that the application by the rival Union to displace Christian Labour Association as the bargaining agent was untimely and, therefore, dismissed.

Mobility Rights

Section 6 of the New Canadian Constitution provides:

1. Every citizen of Canada has the right to enter, remain in, and leave Canada.
2. Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right.
   (a) to move and to take up residence in any province; and
   (b) to pursue the gaining of a livelihood in any province.
3. The rights specified in subsection (2) are subject to
   (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
   (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
4. Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

[39] R.S.C. 1982, Ch. 124.

[40] Re: *Service Employees Union Local 204,* and *Broadway Manor Nursing Home,* and *Christian Labour Association of Canada* (1983) OLRB File 1559-82.

The Charter of Rights ensures that Canadians are free to enter in, remain in, or leave Canada, without interference by the Government.[41] It also fosters the unity of Canada. Sir John A. Macdonald, First Prime Minister of Canada, once said:

> ". . .But here, where we are one country and all together, and we go from province to another as we do from one county to another and from one town to another. . ."[42]

Mobility rights give all Canadian citizens and permanent residents the right to live and seek employment anywhere in Canada. In fact, Canadians have assumed, for most of the years since Confederation in 1867, that these rights existed, but never before were they guaranteed in the Constitution. Provinces, particularly in bad economic times, had the tendency to restrict employment opportunities to its residents only. They had tried to justify their action on the basis of legitimate provincial objectives. On the same basis Provincial Governments initially opposed the constitutional guarantee of the mobility right. But the Honorable William Davis, Premier of Ontario, echoed the views of those Premiers who supported the Mobility Right and said:

> "In this respect, I find it difficult to take seriously any concern that entrenching in our Constitution the right of people to live and work anywhere in Canada could frustrate legitimate provincial objectives. Indeed, it is my hope that some day it will be beyond the reach of government to discriminate against the free movement of services as well."[43]

The guarantee of the mobility right means that a Canadian citizen or permanent resident will be able to move to any province or territory from any other, without hindrance, and look for work there. He will also be able to live in one province and be gainfully employed in another. However, this does not prohibit the provinces from setting residence requirements for certain social and welfare benefits existing in the provinces. Moreover, the ordinary rules of employment in the province shall apply to newcomers the same as to longtime residents. These could include qualifications, union membership, experience, health, and so on, provided these applied equally to residents and to people coming from outside the province.

However, subsection 4 of section 6 of the Constitution allows a province in which the employment rate is below the national average to undertake

[41] An example of government interference with mobility rights is the treatment of the Japanese — Canadians during, and after, World War II. In the 1940s the Cabinet issued an order under the authority of the War Measures Act which stripped them of their citizenship.

[42] Sir John A. Macdonald, House of Commons Debates, 1882.

[43] Financial Post Conference, Toronto, February 26, 1981.

affirmative action programs for socially and economically disadvantaged individuals.[44]

If the American decisions are any guidance it can reasonably be expected that the Canadian Court would give a liberal interpretation to the Mobility Rights provided in subsection 2 and 3 of the Constitution.

The right to travel interstate is a fundamental constitutional right. Thus a statute in the United States requiring residence within the state jurisdiction for a period of one year as a condition for entitlement to welfare assistance was held uncostitutional by the United States Supreme Court.[45] The Court held that the statute penalized the exercise of the right to interstate travel and could not be justified on the basis that it promoted compelling state interests. Further, the right of interstate travel insures to new residents the same right to vital government benefits and privileges in the state to which they migrate as are enjoyed by other residents. In *Memorial Hospital* v. *Maricopa County,*[46] the U.S. Supreme Court held that the statute establishing one year residence as a prerequisite to receiving non-emergency medical care at government expense was unconstitutional.

A statute requiring the employment of qualified residents of the state in preference to non-residents, and providing that non-residents were to be laid off before any resident, was held to be unconstitutional by the United States Supreme Court, in *Hicklin* v. *Orbeck*.[47] The Court pointed out that even if the state could be said to suffer from uniquely high unemployment, an across the board preference in favour of all state residents, highly skilled as well as unskilled, was insufficiently related to aiding the unemployed.

Although the new Constitution has allowed the provinces to undertake affirmative action programs, it is unlikely that the courts in Canada would allow them to restrict interstate movement beyond a reasonable limit.

In the case *Federal Republic of Germany* v. *Rauca,*[48] the Ontario High Court held that extradition was a reasonable limitation within the meaning of section 6 (1) of the Constitution which provides that "every citizen of Canada has the right to enter, remain in, and leave Canada". The Court observed:

> Although extradition of a Canadian citizen is *prima facie* an infringement of the rights guaranteed in subsection (1) of this section (6) extradition is a procedure provided by law and is a reasonable limitation on such rights which can be demonstrably justified within the meaning of Section 1 (of the Constitution). Such a statutory restriction which has as its objective the protection and preservation of society from serious criminal activity is one which members of a free

[44] The Constitution Act, 1982, Section 6(4)

[45] *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

[46] 415 U.S. 250 (1974).

[47] 437 U.S. 518 (1978).

[48] *Federal Republic of Germany* v. *Rauca*, (November 4, 1982, Ont., H.C., Evans C.J.).

democratic society, such as Canada, would accept. To hold otherwise would be to find that a procedure which has been accepted in Canada for over a century and in most other democratic societies is no longer a reasonable and proper method of protecting society from serious criminal activities.

In *Skapinken v. Law Society of Upper Canada,*[49] the Ontario High Court held that "section 28 (e) of the *Law Society Act* R.S.O. 1980, c. 233, discriminating between Canadian citizens and permanent residents of Canada, does not violate section 6 (2) (a) and 6 (2) (b) of the Charter."

Legal Rights

These legal rights outlined in sections 7 to 14 of Constitution spell out the basic legal protection that safeguards an individual in his dealings with the state and its machinery of justice. These rights are intended to protect the individual and to ensure simple fairness should he or she be subject to legal proceedings, particularly criminal cases.

These legal rights are, in fact, an expansion of those included in the *Canadian Bill of Rights of 1960,* and most of them already existed in Canada by precedent and practice, or ordinary statute law. Enshrining them in the Constitution has assured Canadians that they would not be denied of these rights easily either by the state or its law enforcement agencies. Commenting on the *Canadian Bill of Rights,* Chief Justice Bora Laskin once observed:

> "Our society is anchored as well on openness of our courts, and of our Legislative Assemblies, underpinned by a universal franchise, on fair procedure before adjudicative agencies, be they courts or other tribunals which, at least, means a right to be heard or to make representations before being condemned criminally or made liable civilly. In the administration of our criminal laws, special protections have developed for an accused, such as the rule against forced confessions, the presumption of innocence, and the privilege against self-incrimination. These values are not absolutes, but a heavy burden lies on any Legislative Assembly or Court to justify any attenuation of these. The Canadian Bill of Rights, operative on the federal level, has given sanctity to these values, short of constitutional entrenchment."[50]

Right to Life, Liberty and Security of the Person

Everyone has the right to life, liberty and security of person and the right not be deprived thereof except in accordance with the principles of fundamental justice.[51] This section provides for the most cherished of all fundamental rights. It gives effect to the most important incident of what Dicey has characterized as "rule of law". Thus the right to life, liberty, and securi-

[49](1982) 137 D.L.R. (3d) 666 (Ont. H.C.).

[50]Address by Chief Justice Bora Laskin at the University of Alberta, May 4, 1972.

[51]The Canadian Constitution, 1982, Article 7

ty of the individual shall not be taken away by the authorities of the state, except by laws and procedures that are lawful and fair.

It is interesting to note that the Canadian Constitution in Section 7 has not used the usual expression "except in accordance with the procedure established by law" rather it has used the expression "except in accordance with the principle of fundamental justice". The liberty of a person is not an absolute right. The right to life, liberty, and personal security is a relative right. All that is recognized in the Constitution is that a person can be deprived of his life, liberty, and personal security only in accordance with the procedure established by law. Section 7 of the Canadian Constitution has ensured all Canadians that the law and procedure under which they may be deprived of their life, liberty, security shall be based on principles of fundamental justice. Thus, the courts will not be confined in determining whether or not an individual has been deprived of his life, liberty, and security, in accordance with the procedure established by law, rather they will be called upon to determine whether or not the relevant law and procedure meet the criteria of "fundamental justice".

The difficult question whether the words "due process of law" in section 1(a) of the *Bill of Rights* were to include an element of substantive due process rather than mere procedural due process was briefly considered by Laskin J. (now Chief Justice Laskhin), in *Curr* v. *The Queen*.[52] He distinguished between a statutory and constitutional jurisdiction and stated:

> "Assuming that except by due process of law provides a means of controlling substantive federal legislation — a point that did not directly arise in *R* v. *Drybones* (1970) S.C.R. 282) - compelling reasons ought to be advanced to justify the court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enated by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act*. Those reasons must relate to objective and manageable standards by which a Court should be guided if cope is to be found in section 1(a) due process to silence otherwise competent federal legislation."

Since the decision of the Supreme Court of Canada in *Curr* v. *The Queen*, the circumstances have substantially changed with the enactment of the *Constitution Act, 1982*. Now, "the due process of law" is not only guaranteed by a federal statute but by the Constitution. Section 7 of the Constitution provides:

> Everyone has the right to life, liberty, and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.

[52](1972) 26 D.L.R. (3d) 603, (1972) S.C.R. 889.

There has not been yet any decision by the Supreme Court of Canada on this point. However, the decisions of the various provincial courts do indicate some initial trends of judicial opinion. In *Regina* v. *Campagna*,[53] British Columbia Provincial Court Judge Paradis held that the principles of fundamental justice (as used in section 7 of the Constitution) have both a procedural and legislative content and thus provide a valid guide to the legality of procedure. The Court held that section 94.1 (3) of the *Motor Vehicle Act* (B.C.), which provides that the offence created by section 94.1 (2) of driving a motor vehicle while the person's driver's licence is suspended is an absolute liability offence in which guilt is established by proof of driving whether or not the accused knew of the suspension, is contrary to the principle of fundamental justice guaranteed by section 7 of the Constitution. It concluded that an absolute liability offence which require a minimum term of imprisonment to be imposed is a violation of the principles of fundamental justice and is not reasonable limit within the meaning of section 1 of the Constitution.

But, in *Regina* v. *Holman*,[54] McCarthy J., of the British Columbia Provincial Court, expressed the contrary view. He stated that the phrase "the principles of fundamental justice" refers to procedural due process encompassing the rules of natural justice, and this section was not intended to incorporate any concept of substantive due process which would permit the courts to monitor the substantive content of the legislation. Thus the limited meaning attributed by most courts to the phrase "due process of law" in section 1(a) of the *Canadian Bill of Rights* was appropriate in construing this section of the Charter. Judge McCarthy thus concluded that even if section 7 could have a substantive effect, it could not be said that section 235 of the *Criminal Code*, which provides for compulsory breath samples, constitutes an unlawful infringement of the right to life, liberty, or security of the person.[55]

However, in *Regina* v. *McGregor*,[56] Judge Charles of the Ontario Provincial Court held:

> "Section 453.3 of the *Criminal Code*, which provides that an appearance notice, promise to appear or recognizance may require an accused charged with an indictable offence, which could include hybrid offences, to attend for fingerprinting pursuant to the *Identification* of Criminals Act, R.S.C. 1970, C. 1-1 *is contrary to the provisions of this section (7) and section 8*, and such infringement cannot be considered a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society within the meaning of section 1." (Emphasis added)

The courts have held that the deportation order under the Immigration Act does not violate section 7 of the new Constitution. The Federal Court

[53](1982), 8 W.C.B. 178 (B.C. Prov. Ct.).

[54](1982), 8 W.C.B. 257 (B.C. Prov. Ct.).

[55]See also *Regina* v. *Newall (1982) 8 W.C.B. 177 (B.C.S.C.)*.

[56]*Regina* v. *McGregor*, (August 30, 1982) (Ont. Prov. Ct. Charles J.).

of Canada in *Gittens* v. *The Queen*[57] found that the execution of the deportation order did not deprive the applicant of right to life, liberty, and security of person afforded to him by section 7 of the Charter of Rights.

Right to Property

Section 7 of the Constitution is silent over the "right to property". The legislative history of section 7 indicates that the present section 7 is unchanged from section 7 in the Proposed Constitutional Resolution of October, 1980. The amendments which would have included right to property in section 7 of the Constitution were defeated in the the Special Joint Committee on January 27, 1981, and in the House of Commons on April 23, 1981. The amendments would have changed the provision of section 7 to read:

> "Every person has the right to life, liberty, security of the person and enjoyment of property. . ."

Does it mean that Canadians do not have a constitutional "right to enjoyment of property"?

The *Canadian Bill of Rights* had, indeed, recognized and declared the "enjoyment of property" as a fundamental right. It provided:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion, or sex, the following human rights and fundamental freedoms namely,
>
> (a) the right of the individual to life, liberty, security of the person and *enjoyment of property*, and the right not to be deprived thereof except by due process of law. (Emphasis added)

Section 26 of the Constitution provides:

> 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Thus, it is not unreasonable to believe that the Constitution has ensured that the specific guaranteeing of certain rights and freedoms in the Charter, does not deny the existence of any other rights. In other words the Constitution by provision of section 26, also ensures that many of the unspecified human rights and freedoms that were enjoyed by Canadians, either by tradition, or under common law or statute, at the time of passage of the Constitution will not be denied. This view appears to be shared by the Canadian judiciary.

In *the Queen in right of New Brunswick* v. *Fisherman's Wharf Ltd.*,[58]

[57](1982) 137 D.L.R. (3d) 687 (F.C.)

[58](1982), 135 D.L.R. (3d) 307 (N.B.Q.B.)

the New Brunswick Queen's Bench held that "although the Charter does not specifically refer to property rights, the words "right to. . . security of the person" as used in this section (7) must be construed as including the right to enjoyment of the Ownership of Property". The Court stated:

> The lien created by section 19(1) of the Social Services and Education Tax Act, R.S.N.B., 1973 C. S-10, on property used in connection with the business of the vendor, who is the person liable to pay the tax, therefore extends only to property owned by the vendor. *For the lien to extend to property owned by a person other than the vendor*, e.g. property leased to the vendor or held by him under a conditional sales contracts, *would amount to confiscation of property without compensation and would be contrary to the principles of fundamental justice.*

The "right to enjoy property" though has been specifically omitted from the Charter. However, it appears certain that the courts would nevertheless ensure the enjoyment of property as though the rights has been guaranteed by the Constitution.

Equality before the Law

Section 15 of the Constitution provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The equality rights included in the Charter are complementary to and in addition of the already existing anti-discrimination provisions found in the *Bill of Rights* and other human rights legislations in the federal and provincial jurisdiction. Under the Constitution all Canadians — regardless of race, national or ethnic origin, colour, sex or age, as well as those who are physically or mentally disabled — are equal before law, and enjoy equal protection and benefit of the law.

Section 15 of the Constitution asserts the supremacy of law or rule of law. The Rule of Law means that there is one law for all men, that all men are equal before it, and that no man can be punished except for the breach of it. It reconciles social order with individual freedom and initiative. It means that the government itself is not above the law, and that it respects the independence of the courts and safeguards the citizen's liberties.

It may be noted that originally the Constitutional Resolution of October, 1980, has proposed the heading "Non-discrimination Rights" instead of "Equality Rights", and under it, it had proposed as follows:

15 (1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

(2) This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

The Special Joint Committee, however, on January 29, 1981, amended the original proposal and inserted the present wording under the heading "Equality Rights". The original expression "equality before the law and to the equal protection of the law" was changed into "equal before *and under* the law" and "has the right to the equal protection and equal benefit of the law".

Thus, the present provision for equality rights in the Charter is quite broad and is based on the combination of three different concepts. The concept of "equality before the law" is drawn from English Constitutional Law, the concept of the "the equal protection of laws" is drawn from American Constitutional Law, and the concept of "equal benefit of the law without discrimination" is drawn from the United Nation's "Universal Declaration of Human Rights".

The concept of "equality before the law" does not mean equality in the literal sense, for in its true sense, it means equality of rights and duties. It means that among equals, the law should be equal and should be equally administered. In other words, it excludes arbitrariness on the part of the executive. It declares that all citizens, including officials, are subject to the same law and the same courts.

The equality rights provision provides that all persons shall be entitled to the protection of equal laws. It forbids discrimination between persons based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

For the first time in Canadian history, the Constitution has made it clear that, for women, equality is not a right to be acquired, but a state that exists. It ensures that women are entitled to full equality in law — and not just in the laws themselves but in the administration of law as well. Section 28 of the Constitution further provides that "notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".

The equal protection clause secures equal protection to all persons in Canada similarly situated and is a very effective safeguard against the arbitrariness of the legislature and the executive or any public authority. Under this clause not only legislative discrimination but discrimination in the execution of the law is also prohibited.

The Fourteenth Amendment of the United States Constitution in this respect provides that:

> "No state shall make or enforce any law which shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The equal protection clause in the American Constitution was originally inserted for the protection of the negroes but the U.S. Supreme Court has extended its application to all other matters which require protection from discriminatory legislation or discriminatory executive action.

The equality of rights provision in the Canadian Constitution has interesting parallels in the "equality before law" provisions found in articles 14 and 15 of the Constitution of India.[59] The Constitution of India goes a step further and prohibits discrimination "with regard to access to shops, public restaurants, hotels and places of public entertainment".

The Charter, however, is not directed at relations between private individuals and corporations. The remedy for a person who feels he has been discriminated against by an employer will continue to be the filing of a complaint under the appropriate Human Rights legislation. Section 15 (1) of the Charter provides for equal protection and equal benefits of the law without discrimination. Section 32 confines the application of the Charter to the Federal Parliament and the legislatures of each province only. Thus, it is evident that the Charter is not intended to deal with "private discrimination".

The Supreme Court of Canada recently (but prior to the enactment of the Charter) in the case of *Board of Governors of Seneca College of Applied Arts and Technology* v. *Bhadauria*,[60] held that in Ontario, a civil action does not lie for discrimination in employment. Thus, the only recourse presently open to a person who alleges such discrimination is the filing of a complaint under the *Ontario Human Rights Code*. The Charter of Rights, however, would not assist any person who suffers discrimination either in employment or at other public places.

The Charter provides for the equality of every individual "before and under the law". Section 52 of the Constitution provides that any law which is inconsistent with the provision of the Constitution (including the Charter

[59]The Constitution of India, Articles 14 & 15 read as follows:

14. *Equality before Law* — The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.* — (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to —

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

[60](1981) 124 D.L.R. (3rd) 193 (S.C.C.).

of Rights) is, to the extent of that inconsistency "of no force or effect". Those provisions, together with the fact that the Charter does have Constitutional status, should ensure that the courts will hold inconsistent legislation to be invalid. Since *R.* v. *Drybones,*[61] in which the Supreme Court of Canada held a provision of the *Indian Act* to be "inoperative" by virtue of its inconsistency with the *Canadian Bill of Rights of 1960,* the courts have been most reluctant to strike down legislation on the basis of such inconsistency. In *Curr* v. *The Queen,*[62] Justice Laskin (now Chief Justice Laskin) stated that "compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as constrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so. . ."

In the case of *Attorney-General of Canada* v. *Lavell,*[63] *Isaac* v. *Bedard,* the Supreme Court of Canada by majority, gave a very narrow meaning to the words "equality before the law" in section 1(b) of the *Bill of Rights,* construing them in the light of the law that existed in Canada at the time of the enactment of the Bill. The Court said that the phrase was, therefore, "not effective to invoke the egalitarian concept exemplified by the Fourteenth Amendment of the United States Constitution as interpreted by the Courts of that country". Rather "equality before the law" was to be read in its content as part of the rule of law in the preamble to the *Bill of Rights.* In the results it held that section 12 (1) (b) of the *Indian Act,* which discriminated against Indian women who married non-Indian men, causing them to lose their registered Indian status, whereas Indian men who married non-Indian women did not lose their status, was not inoperative by reason of the *Bill of Rights.*

However, it is now hoped that the specific provisions and directions in the new Constitution will end this reluctance on the part of the Canadian courts to strike down discriminatory legislation.

Affirmative Action

The Charter specifically permits affirmative action to improve the conditions of disadvantaged groups or individuals who may have suffered as a result of past discrimination. Section 15 (2) of the Constitution allows programmes designed to achieve equality which might otherwise be precluded by the rules against discrimination in section 15 (1). Thus, for example, special programmes designed to promote equal employment opportunities for women and the disabled will not be unconstitutional. It is an assurance that an affirmative action programme based on a recognized ground of non-discrimination will not be struck down only because it authorizes "reverse discrimination" for the purpose of achieving equality.

[61] (1970) S.C.R. 282, (1970) 9 D.L.R. (3rd) 473 (S.C.C.)

[62] (1972) S.C.R. 889, (1972) 26 D.L.R. (3rd) 603 (S.C.C.)

[63] (1974) S.C.R. 1349, (1973) 38 D.L.R. (3rd) 481 (S.C.C.)

By virtue of section 32 (2) this section does not come into force until April 17, 1985. The application of the "Equality Rights" provision of the Charter has been delayed to allow time to the federal and provincial governments to review and change any laws that may not conform to the rights and freedoms guaranteed under the Charter. It was hoped that this would eliminate a considerable amount of unnecessary and expensive litigation.

CONCLUSION

The Charter of Rights has turned a new page in Canadian history. As the name of former Prime Minister John Diefenbaker is associated with the *Canadian Bill of Rights*, Prime Minister Pierre Elliot Trudeau will be remembered for his efforts and dedication to the enactment of the *Canadian Charter of Rights and Freedoms*.

Parliament, by enshrining the lofty principles of human values and dignity, has created new hopes and has provided new directions for its people to build a united country where present and future generations can live with pride.

By enacting the *Charter of Rights* Canada has joined the major league of nations who have enshrined the fundamental rights of their people in their Constitutions. After guaranteeing fundamental rights the Canadian Parliament appointed the courts as the custodian of those rights. The Parliament has entrusted the courts, in fact, the Supreme Court of Canada (though the Supreme Court of Canada has not specifically mentioned as such) with the ultimate responsibility for the enforcement of those rights and for providing an appropriate remedy. Section 24(1) of the Constitution states:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances.

While entrusting the courts with the responsibility of enforcing the fundamental rights, Parliament has also laid down a significant directive principle of a fundamental nature for their guidance. The Charter, in section 27, states:

> This Charter shall be interpreted in a manner consistent with the perservation and enhancement of the multicultural heritage of Canadians.

Canadians are proud that this country has not become a melting pot but has maintained its multicultural character. In the words of former Prime Minister, the Right Honourable John Diefenbaker,

> Canada is a garden. . . into which has been transplanted the hardiest and brightest flowers of many lands, each retaining in its new environment the best of the qualities for which it was loved and prized in its native land.

The directive principle of multiculturalism, on the one hand, guides the courts in the interpretation of the Charter, and on the other hand, it imposes a responsibility on its people. It demands from Canadians acceptance in their hearts the principle of multiculturalism, by developing tolerance, understanding, and respect for cultures other than their own. A society is known, in the true sense, by the people and their actions and not by its laws.

The effectiveness of the law is judged not by its wordings but by its application and its acceptance by the people. Whether or not Canadians, in fact, would be able to enjoy the freedoms and liberties guaranteed under the Charter is to be seen in the years to come.

The Province of Quebec has already reserved its allegiance to the new Canadian Constitution. Furthermore, the Province of Quebec has recently enacted Bill 111, a back-to-work legislation for the teachers, and has exempted that statute from the application of the *Canadian Charter of Rights and Freedoms* as well as from the Quebec Charter of Rights. By incorporating such provisions in Bill 111, the Province of Quebec has thrown out of the window all the lofty principles of liberty and the rule of law enshrined in the new Canadian Constitution. This enactment has been severely critized by all segments of the society including the Civil Liberties Association. The Government of Quebec has defended its action in the name of "an emergency". However, by enacting Bill 111, the Province of Quebec has, indeed confirmed the fears of proponents of the Canadian Charter of Rights that basic human rights in the hands of Provincial governments were not safe.

It is too early to predict how the courts would interpret enactments such as Quebec's Bill 111. However, people, on both sides of the fence would be eager to have a verdict from the highest court of the land. In the writer's opinion the Canadian judiciary is second to none in the world and the people of Canada have faith and confidence that the courts would protect their fundamental rights from the abuses of power by governments, legislatures, and administrators, come what may.

Provincial court decisions over the Charter of Rights' issues, so far handed down confirm the belief that the courts would place a liberal interpretation in favour of protecting the fundamental rights guaranteed in the Constitution. Some of the provincial courts do differ in their approach and interpretation. Thus the dust would not be settled till the final verdict is given by the Supreme Court of Canada on those vital issues. Meanwhile, the country is at the crossroads awaiting confirmation of its new hopes enshrined in the Constitution.

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